



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF L-T-, INC.

DATE: JULY 18, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software engineering, design, and consulting company, seeks to employ the Beneficiary as a software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its ability to pay the proffered wages of all the beneficiaries of the Form I-140, Immigrant Petitions for Alien Workers (I-140 petitions), it had filed.

On appeal the Petitioner submits additional documentation and asserts that the evidence now establishes its ability to pay the proffered wages of all the beneficiaries of its I-140 petitions.

Upon *de novo* review, we will withdraw the Director's decision and remand the case for further consideration and the issuance of a new decision.

## I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

To be eligible for the classification requested for the beneficiary, a petitioner must establish that it has the ability to pay the proffered wage stated on the labor certification. As provided in the

regulation at 8 C.F.R. § 204.5(g)(2):

The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records may be submitted by the petitioner or requested by [USCIS].

## II. ANALYSIS

As indicated in the above regulation, the Petitioner must establish its continuing ability to pay the proffered wage from the priority date<sup>1</sup> of the petition onward. The priority date in this case is May 22, 2017. The labor certification states that the offered wage for the job of software engineer is \$85,197 per year.

In determining a petitioner's ability to pay the proffered wage, USCIS first examines whether the beneficiary was employed and paid by the petitioner during the period following the priority date. A petitioner's submission of documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage for the time period in question, when accompanied by a form of evidence required in the regulation at 8 C.F.R. § 204.5(g)(2), may be considered proof of the petitioner's ability to pay the proffered wage.

The record shows that the Beneficiary has been employed by the Petitioner as a software engineer since before the priority date of May 22, 2017. In his decision the Director noted that the Petitioner had submitted copies of its 2016 federal income tax return, showing net income of \$132,398 and net current assets of \$122,652, and three pay statements to the Beneficiary, the last dated September 15, 2017, showing that as of that date the Beneficiary's gross pay for the year stood at \$49,173. Based on this evidence the Director concluded that the Petitioner had established its ability to pay the proffered wage to this Beneficiary, but denied the petition because he also found that the Petitioner had not established its ability to pay the proffered wages of all its other I-140 beneficiaries. On appeal, the Petitioner submits a copy of the Beneficiary's 2017 Form W-2, Wage and Tax Statement (W-2 form), which shows that the Beneficiary's gross pay for the entire year was \$71,077, which is \$14,120 below the proffered wage. Therefore, we withdraw the Director's finding that the Petitioner has established its ability to pay the Beneficiary's proffered wage based on the wages paid to him in 2017.

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<sup>1</sup> The "priority date" of a petition is the date the underlying labor certification is filed with the DOL. See 8 C.F.R. § 204.5(d).

If a petitioner does not establish that it has paid the beneficiary an amount equal to or above the proffered wage from the priority date onward, USCIS will examine the net income and net current assets figures recorded on the petitioner's federal income tax return(s), annual report(s), or audited financial statements(s). If either of these figures, net income or net current assets, equals or exceeds the proffered wage or the difference between the proffered wage and the amount paid to the beneficiary in a given year, the petitioner would be considered able to pay the proffered wage during that year. However, where a petitioner has filed other I-140 petitions, the Petitioner must establish that its job offer is realistic not only for the instant Beneficiary, but also for the beneficiaries of its other petitions (I-140 beneficiaries). A petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977). Accordingly, the Petitioner must demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the every other I-140 beneficiary from this petition's priority date until the other I-140 beneficiaries obtain lawful permanent resident status. *See Patel v. Johnson*, 2 F.Supp. 3d 108, 124 (D.Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).<sup>2</sup> As such, the Petitioner here must establish that its net income or net current assets in a given year are sufficient to pay the total proffered wages of all its other I-140 beneficiaries, or the difference between their total proffered wages and the wages paid to them.

The record shows that the Petitioner, in addition to this Beneficiary, has 12 other I-140 beneficiaries whose petitions were pending or approved as of, or filed after, this petition's priority date. Based on the W-2 forms submitted by the Petitioner, the wages paid to six of the Petitioner's I-140 beneficiaries exceeded their proffered wages in 2017, and the wages paid to the other six I-140 beneficiaries were \$269,004.88 below their combined proffered wages. Added to the wage deficiency for this Beneficiary, the Petitioner's total wage burden for 2017 is \$283,124.88.

In this case, the record includes a copy of the Petitioner's federal income tax return, Form 1120, for the year 2016, which was the most recent filed by the Petitioner at the time it was submitted to USCIS and at the time of this appeal. However, without the Petitioner's 2017 federal tax return (or an annual report or audited financial statement for 2017), we are unable to assess the Petitioner's ability to pay this Beneficiary and the other sponsored beneficiaries. As such, we will remand this matter to the Director to request regulatory required evidence of the Petitioner's ability to pay in 2017.

We note that the Petitioner asserts on appeal that two of its I-140 beneficiaries had stopped working for the company before 2017, and therefore the proffered wages of those two individuals should be subtracted from the Petitioner's total proffered wage obligation. While the Petitioner states that two

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<sup>2</sup> The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

of its I-140 beneficiaries ceased to work for the company in 2015 and 2016, USCIS records indicate that the Petitioner has never withdrawn these two petitions. Therefore, the petitions remain approved, the beneficiaries could resume working for the Petitioner at any time, and the Petitioner must still show that it has the ability to pay their proffered wages.

### III. CONCLUSION

For the reasons discussed above, we will remand this case to the Director for further consideration of whether the Petitioner has the ability to pay the proffered wages of all its I-140 beneficiaries.

**ORDER:** The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of L-T-, Inc.* ID# 1554798 (AAO July 18, 2018)